Filed 6/7/17 P. v. German CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL GERMAN, Defendant and Appellant.	B270020 (Los Angeles County Super. Ct. No. BA410044)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charlaine F. Olmeda, Judge. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rafael German (defendant) appeals from his conviction of second degree murder. He contends that substantial evidence did not support a finding of implied malice, and that the cause of the victim's death was an unforeseeable intervening act. As we find no merit to either contention, we affirm the judgment.

BACKGROUND

An amended information charged defendant in count 1 with driving under the influence of alcohol and a drug, causing injury, in violation of Vehicle Code section 23153, subdivision (a). In count 2, defendant was charged with driving with a blood alcohol content of .08 percent, causing injury in violation of Vehicle Code section 23153, subdivision (b), and in count 3, with driving with a suspended or revoked driving privilege, in violation of section 14601.1, subdivision (a). Count 5[1] charged defendant with the murder of Sur Promise Cullins (Cullins) in violation of Penal Code section 187, subdivision (a). As to counts 1 and 2, the amended information further alleged that defendant proximately caused bodily injury and death to the victims in violation of Vehicle Code section 23558.

A jury found defendant guilty as charged, and found true the special allegations. On January 29, 2016, the trial court sentenced defendant to a term of 15 years to life in prison as to count 5, a term of three years as to counts 1 and 2, count 1 to run concurrently and count 2 stayed pursuant to Penal Code section 654. The court imposed a concurrent term of six months as to count 3. The court scheduled a later hearing to determine victim restitution and presentence custody credit, and ordered defendant to pay mandatory fines and fees.

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[1] There was no count 4 in the amended information.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Subject incident

On April 11, 2013, shortly after 8:00 p.m., Jovan Simril (Simril) attempted to cross four-lane Avalon Boulevard at 80th Street, with her three-year-old son, Cullins. Although there was no marked crosswalk or traffic signal, Simril had crossed at that intersection many times. According to a police officer who had patrolled the area, it is common for people to cross Avalon Boulevard at intersections which are not marked with a crosswalk. The speed limit in that area is 35 miles per hour.

Simril carried Cullins in her arms resting on her right hip as she crossed the street. She wore a black leather jacket, and Cullins wore a gray hoodie. The weather was clear though it was not yet dark, the streetlights were on. Simril looked both ways, first to the left, saw no cars, and then to her right. At first, she saw no cars on the right, so she began crossing the southbound lanes, and had barely made it to the double yellow line in the middle of the street, when she saw defendant's SUV approaching, travelling northbound.[2] Simril testified that defendant was "coming so fast, like, he was coming so fast." She turned and tried to run back to the curb, but was hampered by her wedge heels and the weight of Cullins on her hip, so she tried to move Cullins to her left hip. The next thing she knew she was in the middle of the street with a broken leg, and Cullins was lying face down in the gutter, which she estimated to be about 40 feet away. Simril dragged herself to Cullins as people gathered around them.

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[2] Although the jury had the advantage of diagrams and photographs to help them envision the scene, the parties failed to have the exhibits transmitted to this court.

Simril admitted that she had consumed beer and smoked marijuana earlier that day, and that she had used cocaine a few days before that. She denied being under the influence of marijuana or cocaine at the time of the accident. Simril spent several days in the hospital, where a metal rod and screws were used to repair her leg. Cullins died at a different hospital.

Officers Delia Martinez and Antonio Martinez, were the first police officers to arrive on the scene. They encountered a crowd of 30 to 40 people, some flagging them down, surrounding Simril and the unconscious Cullins. Some pointed toward defendant, who was then facing the officers. As soon as defendant looked at the officers, he turned around and began speed-walking in the direction of his car, parked on the south side of Avalon Boulevard, followed by several people in the crowd. Officer Delia Martinez followed defendant as he got into the SUV, and when she saw brake lights and then backup lights, she told him to step out of the car. She had to repeat the request several times before he complied. Once out of the car, defendant said, "It was dark. They came out of nowhere. And that was it. You can't even pass right there." Pointing to the corner, defendant said, "You ain't got a line right here. You can't even cross."[3] "They came out of the blue. I did not see them." He then asked, "What the fuck did I hit?" Officer Martinez noticed that defendant's speech was slurred and his eyes were red. He told her that he had consumed "MD," an alcoholic beverage.

After paramedics arrived, Officer Antonio Martinez joined his partner, who was still with defendant. Defendant was agitated and verbally confrontational with the crowd. There was an odor of alcohol on defendant's breath, he had difficulty

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[3] It is not unlawful for pedestrians to cross in unmarked crosswalks at intersections. (See Vehicle Code sections 21950, 21954.)

maintaining his balance, his speech was slurred, and his eyes were glassy, red, and watery. While administering a field sobriety test, Officer Martinez asked defendant whether he had taken any medication, whether he was ill or injured, and whether he had been drinking alcohol. Defendant replied that he had drunk MD three to four hours before the incident. However, defendant thought it was 7:00 pm, when it was actually 8:40 p.m. He said he had not eaten anything that day.

Defendant did not perform satisfactorily on the field sobriety tests, including inappropriate laughing, and Officer Antonio Martinez formed the opinion that defendant was under the influence of alcohol and unable to operate a motor vehicle on the highway. He also formed the opinion that defendant had violated Vehicle Code section 21950, subdivision (c), failing to reduce speed for pedestrians. An inventory search of defendant's car turned up a full, capped "MD 20/20" bottle, as well as one that was open with purple liquid residue. A bottle cap was found in the footstool of the driver's seat.

There were no skid marks near the accident scene. All the damage to defendant's SUV was on the front left and driver's side of the car. A debris trail traveled from the number one northbound lane into the left-turn and number one lanes of southbound Avalon Boulevard. Although there were no witnesses to the collision, one person saw defendant make a U-turn afterward and come back into the southbound lane.

Officer Kimberly Gipson transported defendant to the police station about five minutes away. At 9:31 p.m. and again at 9:35 p.m., she administered a Breathalyzer test. The first test showed a blood alcohol content of .16 percent. The second showed a blood alcohol content of .14 percent. Officer Gipson offered defendant a blood test but he refused. Although she did not

question defendant, he told her that he should have kept going like he did the last time.

Criminalist Melissa Kramer-Samarrett explained the effects of alcohol on perception and reaction time. Even small doses of alcohol affects distance perception and reaction time, and tend to narrow the plane of vision, much like wearing blinders. With a blood alcohol content as low as .05, most people are significantly impaired in the ability to drive a motor vehicle. In response to a hypothetical question mirroring facts of defendant's field sobriety and Breathalyzer tests, Kramer-Samarrett gave her opinion that having a blood alcohol content of .16 and then a .14 percent about 20 to 40 minutes after the collision, meant that it was not safe for the subject to have been driving a motor vehicle.

Deputy Medical Examiner Pedro Ortiz performed the autopsy on Cullins. Dr. Ortiz testified that the child died due to multiple blunt injuries to the head which resulted in a fractured skull and bleeding in the brain. Cullins also suffered otherwise survivable fractures in the pelvis and both legs. In his opinion, the child was struck by a vehicle in the legs first, then was propelled out of his mother's hands, and landed on his head. Dr. Ortiz testified that the information he was given by officers was inconsistent or was missing facts regarding the contact between the vehicle and the child's pelvis, but he opined that being hit by a car caused Cullins to be propelled. On cross-examination, Dr. Ortiz agreed that it was possible that the child was propelled as a result of being thrown as opposed to being struck by something.

Prior uncharged incident

On December 1, 2012, just after midnight in West Covina, defendant ran a red light while driving his Ford F-150 truck, and struck a sedan that was about to turn left. Witness Kevin Jimenez (Jimenez) testified that the light was a stale red, and the sedan had a green left-turn arrow. After colliding with the

sedan, defendant's truck hit a restaurant sign, and then began to back up and go forward several times. The sedan was very close to defendant's truck, and the movement back and forth appeared to witness Carlos Espinoza (Espinoza) to be endangering the sedan's occupants, who were trapped inside. After Espinoza helped them out through the driver's side window, a security guard arrived, opened the driver's door of the truck, removed the ignition key, and he and Espinoza forced defendant out of the truck.

Espinoza testified that defendant was incoherent, his speech was slurred, he could not focus, and appeared to be intoxicated. Defendant walked away from the scene toward a gas station despite Espinoza's demands to remain there. Defendant stumbled while walking to the gas station, and appeared to Jimenez to be drunk. After Espinoza threatened to make him remain there, defendant sat on the curb, and soon the police arrived.

Police Corporal Nicholas Franco, an experienced investigator of cases involving driving while intoxicated, arrived at the scene about 12:40 a.m. He interviewed the driver of the sedan, and then spoke to defendant. Corporal Franco observed injuries on defendant, swelling around his left eye and purplish discoloration. In addition, defendant's speech was slurred, his eyes were bloodshot and watery, he had difficulty maintaining balance, and he smelled of alcohol. Defendant admitted that he had been drinking alcohol, that he had taken a Vicodin tablet, and that he felt the effects of both. Corporal Franco also determined that defendant's driver's license had been suspended. He placed defendant under arrest, and blood was drawn at the police station at 2:17 a.m. A later analysis of the blood sample showed that defendant's blood alcohol content at that time was .11 percent.

Senior criminalist Somavadey Neal testified that, assuming that a man who weighed 230 pounds stopped drinking at 11:35 p.m., and registered a blood alcohol content of .11 at 2:17 a.m., the subject's consumption would be the equivalent of five cans of beer, five glasses of wine, or five shots of hard liquor. His ability to drive a motor vehicle safely would be impaired.

The parties entered into several written stipulations regarding DMV records that have not been made part of the appellate record. As both parties have summarized them in their briefs without objection, we accept their representations as to the stipulations and the contents of the DMV records. One DMV record showed that defendant's driver's license had been suspended twice, once on November 3, 2012, and again on January 27, 2013. Another showed that in 2009 and 2011, defendant signed driver's license applications that included a "Watson advisement," which read as follows: "Driving under the influence of alcohol, drugs, or both impairs your abilities to drive or operate a motor vehicle safely. If you drive under the influence of alcohol, drugs, or both and someone is killed as a result of your driving, you could be charged with murder."

Defense evidence

Officer Delia Martinez was recalled as a defense witness. In her opinion, defendant had been northbound at the time of the collision.

Emergency room physician Nadia Fakoory testified that she treated Simril after the collision. Dr. Fakoory found that Simril was clinically intoxicated. Simril reported that she had been drinking alcohol and had used crack cocaine sometime that day or that night. Dr. Fakoory administered morphine due to Simril's broken leg, and afterward ordered urine and blood tests. Simril's blood and urine samples were positive for cannabinoids, cocaine, and opiates. Her blood alcohol content was .147, almost

.148 percent. The supervisor of the laboratory, Jovita Velasco, testified that it was possible to test positive two days after ingesting cocaine and marijuana, as metabolites, a byproduct of the drugs, will remain in the body for that long.

Traffic accident reconstruction expert, C. Dean Brewer was retained by the defense. He reviewed the preliminary hearing transcript, police reports, photographs, and diagrams, and he observed a black rubber abrasion mark on the left side of the car which appeared to have be made by the sole of Cullins's shoe. In Brewer's opinion, the leading edge of the front hood of defendant's car appears to have hit the child at about his legs. Cullins's location on his mother's hip was consistent with the height of vehicle. Brewer estimated that after the impact, the child traveled through the air a distance of 83.2 feet. Based upon witness statements and certain formulas, Brewer estimated that defendant's speed was about 35 to 40 miles per hour.

Brewer found no evidence that defendant was driving recklessly or at an unsafe speed, or that he swerved or crossed the double yellow line into the southbound traffic. In Brewer's opinion, it was Simril who crossed the double yellow line, stepped in front of defendant's northbound vehicle, and was struck while she was in the number one northbound lane of Avalon Boulevard. Brewer agreed, however, that it was possible that the collision occurred in the southbound lanes. All of the debris was located on the southbound side of the street, and although the location of the first undisturbed piece of debris usually indicated the location of impact, Brewer did not know whether the debris had been disturbed.

Brewer explained how it was difficult to see someone at night wearing black or dark colors, or a person with a dark

complexion.[4] However, his report indicated that the intersection was well lighted, with four street lights on the corners, including one over the area where Simril stepped off the curb.

Brewer estimated that Simril had walked approximately 40 feet into the street, which would have placed defendant about 500 feet away (167 yards, or the length of one and three-quarters of a football field), when she stepped off the curb, about eight seconds before the collision. Because she was illuminated only by street lighting, Brewer thought it was probable that defendant did not see her. If defendant had seen her, he would have been able to stop within 271 feet, or about 90.3 yards. Defendant should have been able to see her when he was 188.18 feet away, and based upon vehicle capabilities, drag coefficient, and usual human behavior and reaction time, Brewer would expect some reaction at that distance in an attempt to avoid the collision. Brewer concluded that the accident was not necessarily alcohol related, as intoxicated drivers sometimes experienced appropriate reaction times, and accidents unrelated to alcohol did happen.

Toxicology expert Rody Predescu testified about the possible effects of opiates, cannabinoids and cocaine. He testified a person would not be impaired by marijuana 12 hours after its use, or by cocaine two days following ingestion. Within those times, however, the effects could include hallucinations, a false sense of confidence, loss of touch with reality, lack of coordination, impaired judgment, and the inability to perceive danger. In his opinion, the combination of alcohol and these drugs could possibly enhance the effects of the other drugs. A person's behavior would be less predictable under the influence of all four substances. Predescu acknowledged that Simril's medical

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[4] Simril is African-American.

record showed that morphine was administered before she was tested for opiates.

Simril was recalled as a defense witness. She testified that her side of the street was clear before starting to cross, and she could see fairly far. At some point, when defendant got close to them, he crossed to the wrong side of the street. Simril was not sure just when, as she was blinded by the lights of defendant's car. He did not try to stop and did not honk. Simril believed that if defendant had kept going straight, he would not have hit them.

Defendant did not testify.

DISCUSSION

I. Substantial evidence of implied malice

Defendant contends that his conviction of second degree murder was unsupported by substantial evidence showing that he acted with a conscious disregard for human life.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

"[B]ecause 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal

on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Murder is the unlawful killing of a human being with malice aforethought, which may be express or implied. (§ 187, subd. (a); § 188.) "Malice is implied when the killing is proximately caused by '"an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."' [Citation.] In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another -- no more, and no less." (*People v. Knoller* (2007) 41 Cal.4th 139, 143.)

In *People v. Watson* (1981) 30 Cal.3d 290, 300-301 (*Watson*), the California Supreme Court held that an intoxicated driver who proximately causes death may be convicted of second degree murder when implied malice is proven. Defendant has noted that since *Watson*, courts considering whether substantial evidence supports a conviction under this theory have relied on some or all of the following factors: "'(1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving.' [Citation.]" (*People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1114, quoting *People v. Talamantes* (1992) 11 Cal.App.4th 968, 973.)

Defendant contends that the judgment must be reversed because the evidence does not support the fourth factor, highly dangerous driving. However, no specific combination of factors is required, and neither *Watson* nor cases following it prescribed a required formula or checklist for analyzing the evidence in

vehicular homicide cases, but have instead used a case-by-case approach. (*People v. Olivas* (1985) 172 Cal.App.3d 984, 989.) Such "facts merely are circumstances to be considered in evaluating culpability. Where other evidence shows 'a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied. . . .' [Citations.]" (*People v. Contreras* (1994) 26 Cal.App.4th 944, 955, quoting *Watson*, *supra,* 30 Cal.3d at p. 298.)

Defendant concedes that substantial evidence established that he was "subjectively aware of the risks of driving under the influence," but contends that the prosecution also had to prove that he engaged in highly dangerous driving. He contends that the evidence failed to show that he drove in a manner that was highly dangerous to human life because there was no evidence that he was speeding, driving recklessly, or swerving. He cites several cases in which the defendant drove recklessly or with excessive speed. (See *Watson*, *supra*, 30 Cal.3d 290; *People v. Moore* (2010) 187 Cal.App.4th 937; *People v. Ortiz* (2003) 109 Cal.App.4th 104 (*Ortiz*); *People v. Contreras, supra*, 26 Cal.App.4th 944; *People v. Fuller* (1978) 86 Cal.App.3d 618.) None of these cases held that such facts must be proven as a required element of second degree vehicular murder, and there is no such rule. (See *People v. Moore*, *supra*, at p. 942.)

To support his argument, defendant quotes the following remarks in *Ortiz*, *supra*, 109 Cal.App.4th at page 116: "The real danger presented by drunk driving, in other words, is not intoxication itself, but its conduciveness to recklessness and the significant public threat the *latter* conduct presents. . . . 'When you are a drunk driver, the only reason you pose a danger to people is if you drive badly in addition to drinking too much, drinking too much and obeying the conditions of the road doesn't produce bad consequences, it's the crashing of cars and the killing

of people that *increases one's subjective awareness of the perils of driving badly and speeding and crossing over double yellow lines and passing unsafely . . . .*'" Defendant apparently construes this passage as holding that driving while intoxicated is not, by itself dangerous to human life, and thus requires additional evidence of dangerous driving. The *Ortiz* court did not so hold. A closer reading of the opinion reveals that the court was describing how evidence of a defendant's past experiences might provide circumstantial evidence of his subjective awareness of the danger to life posed by drunk driving. The court acknowledged that "'the reason that driving under the influence is unlawful is *because* it is dangerous . . . .'" (*Id.* at pp. 113-114, quoting *People v. McCarnes* (1986) 179 Cal.App.3d 525, 532.)

Thus, we reject defendant's suggestion that the factors on which defendant relies are elements of the crime. Instead, they are meant to assess circumstantial evidence indicating a defendant's subjective awareness of the risk to human life posed by driving while intoxicated.

As defendant has conceded that he was "subjectively aware of the risks of driving under the influence," we need not refer to the factors at all. Regardless, substantial evidence supported a reasonable inference that defendant's speed was excessive for the circumstances, his attention was not on the road, and that he crossed over the double line. Simril testified that when defendant's car appeared, it was "coming so fast." Simril was not running. She did not see defendant's car when she stepped off the curb, and managed to almost reach the middle of a four-lane, well lighted roadway, a distance of approximately 40 feet, giving defendant ample opportunity to notice her. In addition to the street lights, defendant's headlights were on and shone directly at the victims just before impact. Nevertheless, there were no skid marks at the intersection, defendant claimed that he never

saw the victims, and he did not even know what he had hit. Simril thought that defendant crossed to the wrong side of the street before impact, but did not know for sure, as she was blinded by the lights of his car. However, her belief found some corroboration in the opinion of defendant's expert, who testified that although defendant was headed northbound, it was possible that the impact occurred in a southbound lane, as debris was found on the southbound side of the street. Brewer also testified that given the conditions, defendant should have been able to see her prior to the collision, and given normal human reaction time, he should have been able to see her in time to take appropriate action to avoid the collision.[5]

In sum, defendant concedes that the evidence established that he drove with a blood alcohol content more than .08 percent and that he was aware of the risks involved in driving drunk. The jury's finding of implied malice was reasonable and supported by substantial evidence.

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[5] Defendant argues that we should consider conflicts in the evidence: Simril's testimony conflicted with some of her preliminary hearing testimony, and contradicted her prior testimony that defendant swerved; Brewer testified that Simril may have stepped in the path of defendant's car; and there was no evidence that defendant was exceeding the posted speed limit. We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "If there is conflicting testimony, we must accept the [jury's] resolution of disputed facts and inferences, its evaluations of credibility, and the version of events most favorable to the People, to the extent the record supports them. [Citations.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 342)

II. Cause of death

Defendant contends that the evidence failed to establish that the collision caused Cullins's death. Defendant contends that Cullins might have sustained the fatal head injuries as a result of having been hurled though the air by his mother due to her intoxicated state. Defendant argues that such facts amounted to an unforeseeable intervening cause of death.

"It has long been the rule in criminal prosecutions that the contributory negligence of the victim is not a defense. [Citations.] In order to exonerate a defendant the victim's conduct must not only be a cause of his injury, it must be [an unforeseeable] superseding cause. . . . [A] victim's predictable effort to escape a peril created by the defendant is not considered a superseding cause of the ensuing injury or death. [Citations.] . . . 'When defendant's conduct causes panic an act done under the influence of panic or extreme fear will not negative causal connection unless the reaction is wholly abnormal.' [Citation.]" (*People v. Armitage* (1987) 194 Cal.App.3d 405, 420-421, fn. omitted.)

Defendant contends that the act of a highly intoxicated mother throwing her child into the air after he suffered survivable injuries in a collision was unforeseeable. Defendant's premise is apparently that only an intoxicated mother would, in a panic, attempt to throw her child to safety, whereas a sober mother would calmly take stock of the circumstances after the impact and (as she was being knocked to the ground herself) decide not to throw her child. While we find no logic to defendant's premise, we reject defendant's contention for the simple reason that there was no substantial evidence that Cullins was hurled though the air by his mother, either before or after the collision.

Defendant contends that Dr. Ortiz was unable to determine the cause of death. He is mistaken. Dr. Ortiz testified that

Cullins died of head injuries, and also sustained survivable fractures of the pelvis and both legs. Further, contrary to defendant's contention that Dr. Ortiz was unable to determine the cause of the head injuries, he testified that in his opinion, the child was struck by a vehicle in the legs first, was then propelled out of his mother's hands, and landed on his head. Dr. Ortiz testified that the information given to him by officers was inconsistent or missing facts regarding the contact between the vehicle and the child's legs and pelvis, but his testimony was unclear about what was missing. However, he did confidently opine that being struck by a car caused Cullins to be propelled and that he landed on his head, which caused his death.

Defendant points to Dr. Ortiz's testimony that it was possible that the child was propelled as a result of being thrown as opposed to being struck by something. The opinion cited by defendant was given in response to several defense questions to Dr. Ortiz in cross-examination, asking whether Cullins *could* have been struck by something other than a car, whether his head injuries *might* have been caused by something other than being struck by a vehicle, and whether it was *possible* that he was thrown as opposed to being struck by something. Dr. Ortiz's responses were: "In the realm of possibilities, yes, I think it could"; "I don't have any problem with that scenario"; and "Yes, sir. I think so."

An expert's opinion on an ultimate issue of fact may constitute substantial evidence only if it is based upon an adequate factual foundation. (*People v. $47,050* (1993) 17 Cal.App.4th 1319, 1325; see *People v. Douglas* (1987) 193 Cal.App.3d 1691, 1695.) An "expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . . .' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1008-1009.)

Here, there was no evidence that Simril threw her son, nor was there evidence that she was even capable of hurling a three-year-old child 80 feet through the air, the distance estimated by defendant's expert. On the other hand, Dr. Ortiz's opinion that Cullins was propelled by the impact was supported by Sirmril's testimony that she held him in her arms, trying to transfer him to her other hip, when she was struck by the car, and by the testimony of defendant's expert, based on his review of the preliminary hearing transcript, police reports, photographs, and diagrams. Brewer observed a black rubber abrasion mark on the left side of the car which was consistent with the sole of Cullins's shoe, and found that the height of the shoe marks, the damage to the hood and side of the car, the child's position on his mother's hip, and his leg injuries, were all consistent with his having been struck by the car. From such testimony and the fact that Cullins was propelled 80 feet through the air, the jury could reasonably conclude that it was the impact that propelled him to his death.

The trial court refused defendant's request for an instruction regarding independent intervening cause but allowed defense counsel to argue the theory at length in summation. The jury rejected defendant's theory by finding him guilty of murder. "[W]here the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury. [Citation.]" (*People v. Towler* (1982) 31 Cal.3d 105, 118.) As the weight of the evidence supported the jury's implied finding that defendant's conduct caused the child's death, and no substantial evidence supported defendant's theory, we are bound by the jury's finding.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT